FILED MARCH 16, 2006

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT - LOS ANGELES

In the Matter of **RICHARD ADAM MARCUS**, **Member No. 183140**, A Member of the State Bar.	)	**Case No. 01-O-03028-RAH** **DECISION**

I. INTRODUCTION

In this disciplinary matter, Charles T. Calix and Michael J. Glass appeared for the Office of the Chief Trial Counsel of the State Bar of California (State Bar). Respondent Richard Adam Marcus (respondent) was represented by counsel, David A. Clare.

After considering the evidence and the law, the court recommends, among other things, that respondent be suspended from the practice of law for three years; that execution of the suspension be stayed; and that he be placed on probation for three years on conditions including, *inter alia,* nine months' actual suspension.

II. SIGNIFICANT PROCEDURAL HISTORY

On March 13, 2006, the court filed an order severing this case from the matter entitled *In the Matter of Melodye Sue Hannes*, State Bar Court case no. 01-O-03029-RAH.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in California on June 11, 1996, and has been a member of the State Bar at all times since.

B. Facts:[1]

Underlying this disciplinary action, two young girls became the subjects of a dispute between their maternal grandparents and their father, after their mother, Cheryle, died on March 28, 1997. The dispute, involving the appropriate living arrangements of the girls, became protracted and very bitter, with serious accusations arising from both sides. In the end, Courtney chose to live with her father, and Melissa was married in the Bahamas at age 16 after the court ordered her to also return to her father. However, it is the background leading up to this final resolution that resulted in the charges now pending against respondent.

After their mother's death, Melissa, then 11 years old, and Courtney, then 10 years old, began living with Fran and Arthur Weiss, their maternal grandparents. Their father, Terry ("Terry" or "father"), relocated to Placerville, California, but the children remained with the grandparents while they finished their school year. By all accounts, the grandparents provided the children with a stable and healthy living environment.

The grandparents became very attached to the children, and, on July 23, 1999, Melodye S. Hannes, the grandparents' attorney, filed a petition for guardianship of the minors. On August 23, 1999, Ms. Hannes also filed a petition for appointment of the grandparents as temporary guardians. In support of that petition, statements and declarations were filed, including those written by Melissa, friends of the Weisses, and Arthur Weiss. (Exhibit 2.) In these statements, detailed allegations were made as to the parenting abilities of Terry, the father.[2] Specifically, Melissa noted occasions when she and her sister had visited her father where her father's girlfriend had offered her and Courtney an alcoholic beverage. Arthur Weiss and the other declarants commented on Terry's use and manufacture of illegal drugs, his failure to pay utility

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[1]See also the opinion of the Court of Appeal filed on February 7, 2002. (Exhibit 55).

[2]Exhibit 2 was admitted into evidence over a hearsay objection. In fact, the statements attached to the petition contained multiple levels of hearsay. However, the document was admitted for other than the truth of the matters asserted in the document. Specifically, it was relevant to show the state of mind of Ms. Hannes and, later, respondent, with respect to the fathering skills of Terry, and to show what they believed to be the justification for their attempts to extricate the girls from his custody.

bills, resulting in the electricity being cut off, his lack of attention to the children, his failure to provide adequate meals for the children, his allowing Courtney to drink beer and smoke marijuana with a boy in the neighborhood, and his acts of physical violence with respect to the girls.[3]

On August 23, 1999, the Honorable H. Ronald Hauptman appointed the girls' grandparents "temporary guardians" pursuant to Probate Code sections 2250-2254. (Exhibit 3.)[4]

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[3]When asked, at the trial in this court, whether he ever used illegal drugs in the presence of the children, Terry replied, "Not in their presence, No."

[4]As a temporary guardian, the grandparents had the powers set forth in Probate Code section 2252:

> (a) Except as otherwise provided in subdivisions (b) and (c), a temporary guardian or temporary conservator has only those powers and duties of a guardian or conservator that are necessary to provide for the temporary care, maintenance, and support of the ward or conservatee and that are necessary to conserve and protect the property of the ward or conservatee from loss or injury. (b) Unless the court otherwise orders: (1) A temporary guardian of the person has the powers and duties specified in Section 2353 (medical treatment). (2) A temporary conservator of the person has the powers and duties specified in Section 2354 (medical treatment). (3) A temporary guardian of the estate or temporary conservator of the estate may marshal assets and establish accounts at financial institutions. (c) The temporary guardian or temporary conservator has the additional powers and duties as may be ordered by the court (1) in the order of appointment or (2) by subsequent order made with or without notice as the court may require. Notwithstanding subdivision (e), those additional powers and duties may include relief granted pursuant to Article 10 (commencing with Section 2580) of Chapter 6 if this relief is not requested in a petition for the appointment of a temporary conservator but is requested in a separate petition. (d) The terms of any order made under subdivision (b) or (c) shall be included in the letters of temporary guardianship or conservatorship. (e) A temporary conservator is not permitted to sell or relinquish, on the conservatee's behalf, any lease or estate in real or personal property used as or within the conservatee's place of residence without the specific approval of the court. This approval may be granted only if the conservatee has been served with notice of the hearing, the notice to be personally delivered to the temporary conservatee unless the court for good cause otherwise orders, and only if the court finds that the conservatee will be unable to return to the residence and exercise dominion over it and that the action is necessary to avert irreparable harm to the conservatee. The temporary conservator is not permitted to sell or relinquish on the conservatee's behalf any estate or interest in other real or personal property without specific approval of the court, which may be granted only upon a finding that the action is necessary to avert irreparable harm to the conservatee. A finding of irreparable harm as to real property may be based upon a reasonable showing that the real property is vacant,

Letters of guardianship were issued on this order. (Exhibit 4.)

Courtney, one of the minor wards, later decided that she wanted to live with her father. As such, the guardianship as to her was terminated on October 12, 2000. The temporary guardianship of Melissa remained in place. (Exhibits 5 and 6.)

On March 14, 2001, a hearing was held before Commissioner Hauptman at which it was ordered that the temporary guardianship remain in effect until trial of the matter, set for May 21, 2001. The order also set up certain visitation rights. (Exhibit 7.) During the hearing, Commissioner Hauptman considered medical reports submitted concerning the health and welfare of Melissa. After an impassioned presentation by the attorney for Terry, the court stated the following (Exhibit 8, Bates stamp page 471):

> The Court finds that there is a concern about detriment to the child in view of changing circumstances where she has resided for some time and been well taken care of. But I would honor [father's] request for a trial, and I'd set the trial...

Commissioner Hauptman warned the parties to "be sure to comply with the readiness requirements of Department 11." (Exhibit 8, page 472.) Later in the hearing, there was further discussion of the "readiness requirements" of Department 11 of the Los Angeles County Superior Court. (Exhibit 8, pages 475-476.) Finally, on May 8, 2001, apparently as a result of an order from the Court of Appeal arising out of a writ filed with that court, Commissioner Hauptman advanced the date to May 16, 2001 for the conduct of an "evidentiary hearing."[5] Once again, Commissioner Hauptman ordered counsel to comply with the readiness policy. (Exhibit 9.)

Respondent became co-counsel of record in April 2001. He was initially retained to

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> that it cannot reasonably be rented, and that it is impossible or impractical to obtain fire or liability insurance on the property.

[5]The record is not clear as to the nature of the writ that was taken. It appears that it was in response to the rulings on the temporary conservatorship. (See Exhibit 12, page 1206.) The appellate court requested findings be sent to it after a hearing on the matter. (See Exhibits 87 [Court of Appeal ordering the Superior Court to set an evidentiary hearing on the first available court date] and 14, Bates stamp pages 1894-95.)

assist in the hearing of the matter.[6] The matter was assigned for trial before Judge Victor Chavez.

The parties appeared in Judge Chavez's court on May 17, 2001. There was extensive discussion about whether the parties were prepared for a full trial or just an evidentiary hearing. Judge Chavez indicated his preference for handling the matter all at once. Respondent and Ms. Hannes requested time to prepare for the full trial. The parties and the court agreed to continue the trial to June 4, 2001. (See transcript of hearing, Exhibit 12.) A three-day trial concluded on June 6, 2001. During the trial, respondent and Ms. Hannes attempted to offer the testimony of Dr. David Feinberg. The court refused to allow this testimony, finding that the grandparents had failed to comply with the trial readiness requirements of the court.

At the conclusion of the trial, Judge Chavez stated the following:

> Whether we apply the standard of preponderance of evidence or clear and convincing evidence, applying either one I do not find that there is a situation such as that suggested. I deny the petition for guardianship. ...

The following interchange then occurred:[7]

> Ms. Hannes: Your Honor, we have two points we would like to make. One is Melissa is in the process of studying for finals. We would request that any move allow her to finish up her finals.
>
> The Court: I think that – I can't imagine that from the remarks of counsel in closing argument, I can't imagine that anyone would uproot this child at this point. There's got to be a period for –
>
> Ms. Hannes: To sort of get used to what's in –
>
> Ms. Pechner (father's counsel): She needs to finish –
>
> The Court: Finish School. She has to make changes, and I would

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[6]When his clients received an adverse ruling in this hearing (see below), he also handled the appeal.

[7]As is set forth in more detail below, respondent contends that the written order that followed differed from the court's oral order in a material way; therefore, the discussion at trial is set forth *verbatim.* (See Exhibit 14, Bates stamped pages 1895-96.) As can be seen from the analysis below, the court does not feel that the differences in the oral and written order materially alter respondent's culpability or discipline in this matter.

> suggest that this is the time for all – both – all of you to now discuss these things. I mean, any antagonism or hostility should be put aside, because it's a matter of ego and that is all. It's not the three of you whose egos we're concerned with; we're concerned with these lovely young ladies; so you must cooperate with each other.
>
> Ms. Hannes: Your Honor, the other thing I would ask is to stay pending our right to appeal.
>
> The Court: How much time do you need for that?
>
> Ms. Hannes: Thirty days.
>
> Ms. Pechner: Your Honor, we don't have an objection to Melissa finishing school, and having maybe a week or two here. I'm not sure when she finishes school, but I think it would be appropriate for her to start her adjustment at home as soon as possible. I think that maybe 30 days –
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> The Court: We're in June. How would 30 days harm that? That just takes us –
>
> Mr. Marcus: July.
>
> Ms. Pechner: I think it might end up having to be 30 days. Because –
>
> The Court: I think their request is reasonable and I will grant your request. Thirty day stay.

Both respondent and Ms. Hannes held strong feelings that returning Melissa to her father was not in her best interest. This position was bolstered by the comments made by Commissioner Hauptman at the March 14, 2001 hearing, the statements and declarations filed in support of the temporary guardianship petition (Exhibit 2), as well as the testimony of Dr. Katz and the anticipated testimony of Dr. Feinberg. It is clear to the court that in assisting Melissa and her grandparents, respondent was acting in a sincere attempt to protect a child he felt was threatened. In representing their clients, both respondent and Ms. Hannes became very close to Melissa. Ms. Hannes, in particular, had developed a close personal relationship with Melissa. Ms. Hannes and Melissa went shopping together, went to the movies and to each others' houses, and generally,

Ms. Hannes considered her a "friend."[8]

After the trial concluded, respondent and Ms. Hannes began examining the options available to them to accomplish the goal of avoiding the return of Melissa to her father. One option discussed was emancipating Melissa by her marriage.[9] Doing so, they felt, would allow her to disregard Judge Chavez's order in the guardianship matter. At this point, Ms. Hannes and respondent agreed that Melissa had three options: 1) speaking with her father about remaining with the grandparents; 2) waiting to see how the Court of Appeal ruled on their writ of supersedeas; or 3) become emancipated through marriage. The third option – emancipation – was always thought of by respondent and Ms. Hannes to be a "backup" position to the appeal, however. That is, the attorneys anticipated proceeding with the appeal even if Melissa got married. If the appeal was successful, it was understood that the marriage would be annulled.

Respondent and Ms. Hannes disagreed on whether the "emancipation option" was something that should be presented to Melissa. Ms. Hannes felt it would not be advisable to do so, and respondent felt they had an ethical obligation to present this option to Melissa. On June 8, 2001, respondent called the State Bar Ethics Hotline for guidance on whether they had an obligation to offer this option to Melissa. After presenting the facts to the counselor at the Hotline and discussing various applicable cases, rules, and statutes, respondent concluded that he had an obligation to present the option to Melissa. (See Ethics Hotline Telephone Log, Exhibit 89.) In fact, after the conversation with the Ethics Hotline, respondent concluded that it would be legal malpractice not to tell Melissa of the emancipation option.

On June 12, 2001, the trial court issued a written judgment denying the grandparents' guardianship petition. (Exhibit 15.) The trial court specifically found, *inter alia*, that the father

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[8]When the trial finally concluded with an order that Melissa return to her father, Melissa started acting out, skipping school, drinking alcohol and threatening to run away or kill herself. On four occasions, after receiving a call from Melissa while she was intoxicated, Ms. Hannes went to various locations, including a pool hall, to pick her up.

[9]It is unclear from the facts who originated the idea of marriage as a method of emancipation. After the ruling by Judge Chavez, Melissa threatened "to run off and get married." It is unclear whether she was aware of whether emancipation would result from that act.

was a fit and proper parent to his children; he had the ability to provide for their needs; it was in Melissa's best interest to be returned to her father's custody; and there was no basis for the trial court to interfere with the constitutionally-protected fundamental right of father to parent his children. The written order of Judge Chavez then ordered, in pertinent part, as follows:

> 1. The petition for guardianship of Melissa W. is denied.
>
> 2. The minor, Melissa W., shall be returned to the custody of Respondent - Father, forthwith."
>
> 3. Petitioners are granted a thirty (30) day stay of the order to return Melissa W.; she shall be returned to the custody of Respondent-Father by July 7, 2001, at the expense of Petitioners.

Between June 15 and June 24, 2001,[10] Ms. Hannes met Melissa at the food court at Costco to discuss the options. Also during this time period, Melissa and Ms. Hannes spoke with the grandparents about the options. In a letter dated June 15, 2001, Ms. Hannes wrote to grandparents and Melissa, informing them in some detail of the law concerning emancipation and the risks associated with electing this option. In that letter, she stated the following in her concluding paragraph:

> I want to make it perfectly clear that I do not know whether you can validly consent under Bahamas law and this is an issue that must be pursued with an attorney in the Bahamas. By signing below, you acknowledge that I am not providing you with any legal advice other than to discuss these issues with an attorney in the Bahamas and to discourage you from pursuing this alternative.

The letter was signed in agreement by Melissa, Arthur Weiss, who signed individually and on behalf of Melissa, and Fran Weiss, under the statement "WE AGREE AND CONSENT TO THE ALL (sic) OF FOREGOING THIS 15TH DAY OF JUNE."

On June 25, 2001, Melissa advised her grandparents and Ms. Hannes that she had decided to get married to Austin Holzer. After some discussion as to whether the grandparents would give their consent to the marriage in their capacity as temporary guardians, they agreed to do so.

On June 27, 2001, grandparents, represented by respondent and Ms. Hannes, filed their notice of appeal from the judgment denying the guardianship petition. (Exhibit 17.) That same

[10]While not material to this decision, the record is inconsistent as to the exact date.

day, grandparents executed purported consent forms, granting their permission for Melissa, then aged 16, to marry 19-year-old Austin Holzer.[11] Also on June 27, 2001, Melissa told Ms. Hannes that she (Melissa) and Austin had gone onto the Internet and researched places that they could go to get married. They concluded, according to Ms. Hannes, that they would go to the Bahamas. She told Ms. Hannes that she did not need a passport to enter the country, only a birth certificate. She also noted that she needed to be in the Bahamas for 24 hours before the marriage ceremony. She therefore concluded that she would fly to the Bahamas on June 28, 2001, with Austin arriving the next day. Melissa then asked Ms. Hannes to accompany her, because her grandparents were too old to travel.

On June 28, 2001, Melissa, accompanied by Attorney Hannes, traveled to the Bahamas for the purpose of the marriage of Melissa and Austin.

Respondent, on behalf of grandparents, concurrently moved the trial court for a stay of the judgment pending appeal on the ground that Melissa would suffer detriment if she were to reside with her father during that time.[12] In seeking that stay, neither respondent nor the grandparents disclosed Melissa's upcoming marriage to the trial court.

On June 29, 2001, respondent, on behalf of grandparents, filed a petition for writ of supersedeas in the Court of Appeal for the Second Appellate District, seeking a stay of the order directing Melissa's return to her father, reiterating the grounds raised in the lower court, and likewise neglecting to inform the Court of Appeal of the upcoming wedding.

On July 2, 2001, Melissa purportedly was married in the Bahamas to Austin. Attorney Hannes executed a Bahamian "Certificate by Parents or Guardian of Consent to Marriage by a

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[11]On the consent forms, the grandparents indicated they were consenting as Melissa's "legal guardians." This purported consent was written on the letterhead of grandparents' counsel, Ms. Hannes. There was no evidence that respondent participated in any way in drafting or obtaining the consents or signatures of Melissa's grandparents on these forms.

[12]The appeal was based, in part, on Code of Civil Procedure section 575(2)(b), which provided that a failure to comply with local rules (i.e., the trial readiness requirements), if such compliance was the responsibility of counsel and not the party, shall not adversely affect the party's cause of action or defense.

Minor," indicating the grandparents' consent to the marriage. In the Bahamas, Ms. Hannes did not disclose the June 12, 2001 judgment denying the guardianship petition to the Bahamian Registrar General. Rather, according to Ms. Hannes, she handed the Registrar General several documents and allowed him to review them himself. The marriage was performed in the presence of Ms. Hannes as one of the witnesses.

On July 5, 2001, respondent spoke with Ms. Pechner on the telephone. Ms. Pechner had heard rumors that Melissa was in the Bahamas. In that conversation, she asked respondent if, in fact, Melissa was in the Bahamas. Respondent answered that she was not, which was a true statement, since Melissa had already returned. Apparently, no follow up question was asked by Ms. Pechner as to whether Melissa had "recently been" (or words to that effect) in the Bahamas. Nothing was said in that conversation about the marriage of Melissa and Austin. On July 7, 2001, Melissa returned to her father in Placerville.

On July 19, 2001, respondent, on behalf of grandparents, filed a request in the Court of Appeal for an immediate stay of the judgment pending appeal. The attached declaration of respondent reported "two new events" of which the Court of Appeal should be aware. Neither of those events was Melissa's purported marriage. In fact, no mention was made of Melissa's marriage in the request for stay. On July 25, 2001, the Court of Appeal summarily denied the petition for writ of supersedeas and request for stay.

On July 30, 2001, father first learned of his daughter's Bahamian marriage when he found a note in his mailbox signed "Melissa Holzer." On the same day, father filed a Domestic Violence Prevention action seeking the return of Melissa to himself. (Exhibits 30 and 31.) On August 1, 2001, he also filed an action seeking to annul the marriage. (Exhibit 36.) On September 25, 2001, father moved for a dismissal of grandparents' appeal on the grounds that the marriage made the appeal moot. (Exhibit 41.) The Court of Appeal issued an order to show cause why the appeal should not be dismissed as moot, specially set the matter, and heard oral argument on February 4, 2002. (Exhibit 52.) In an opinion filed March 19, 2002, the Court of Appeal granted father's motion and dismissed the appeal. In doing so, the Court of Appeal stated that "Grandparents may not obtain review of the judgment while at the same time being in

violation of the very judgment from which they appealed. Additionally, the conduct of grandparents and counsel in arranging Melissa's emancipation by way of the purported marriage has rendered moot the issue of guardianship."

The Court of Appeal imposed monetary sanctions against respondent and Ms. Hannes for continuing to prosecute the appeal after it became moot by reason of Melissa's marriage. The Court of Appeal assessed sanctions in the amount of $13,004 against both respondent Marcus and Ms. Hannes.

Respondent sought review in the Supreme Court, which was denied by order filed May 22, 2002.

C. Conclusions of Law

1. Count One - Business and Professions Code Section 6106 (Dishonesty or Moral Turpitude)[13]

Section 6106 makes it a cause for disbarment or suspension for a member of the State Bar to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his or her relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is clear and convincing evidence that respondent violated section 6106. He and Ms. Hannes jointly had a plan of arranging a marriage with the intent of emancipating Melissa, while simultaneously prosecuting an appeal seeking to overturn the order of Judge Chavez.[14] While not directly involved in making the arrangements for the trip to the Bahamas, respondent was clearly aware that Ms. Hannes was making those arrangements while he was prosecuting the appeal. Further, he planned to take advantage of those arrangements by holding this marriage "in his back pocket" until needed, in the event the appeal was unsuccessful. If the appeal was

[13]Future references to section are to this source.

[14]Respondent argues that these two courses of conduct were not necessarily inconsistent, since it was still an open question whether the marriage would moot the appeal. However, even a quick look at the law on the subject may have revealed a different conclusion. (See Witkin, California Procedure, 4th Edition, "Appeal," section 648.)

successful, he planned to seek to annul the marriage, since the sham would no longer be necessary. As such, he endorsed and ratified Ms. Hannes' conduct in assisting Melissa in securing the Bahamian marriage license, executing the Bahamian Consent Form and participating as a witness to the sham marriage. Accordingly, he committed an act of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

2. Count Two - Section 6106 (Dishonesty or Moral Turpitude)

Counts Three and Four - Section 6068(d); Rule of Professional Conduct[15] 5-200(B) (Misleading Court)

There is clear and convincing evidence that respondent violated section 6106. He did not inform the Court of Appeal of Melissa's putative marriage when her emancipation would render Judge Chavez's judgment void and the appeal moot and thereby made a misrepresentation by omission. He continued to prosecute the case,[16] knowing of her intent to marry, or of the existence of the marriage, and continued to fail to disclose these facts to the superior court and the Court of Appeal. In doing so, respondent put the father, the superior court, and the Court of Appeal through unnecessary time and expense. As such, he committed acts of moral turpitude, dishonesty or corruption in wilful violation of section 6106.

Respondent argues that the fact of the marriage was a client secret within the meaning of section 6068(e)(1). That section states as follows:

> It is the duty of an attorney to do all of the following:
> ...
> (e)(1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

As such, respondent argues he was precluded from disclosing the existence of the marriage to the Court of Appeal until authorized to do so by his clients.

The State Bar contends that the obligation of candor to the Court of Appeal compelled respondent to disclose the existence of the marriage to that court.

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[15]Future references to rule are to this source unless otherwise indicated.

[16]He filed the June 29, 2001, petition for writ of supersedeas, as well as the July 19, 2001, request for immediate stay of the superior court's judgment.

The duty of an attorney to maintain client secrets is absolute and broad in scope. (*People v. Singh* (1932) 123 Cal.App. 365, 370.) It is not limited to information protected by the attorney-client privilege. (*Goldstein v. Lees* (1979) 46 Cal.App.3d 614, 621.) The duty applies to all clients or even to some potential clients where no client-lawyer relationship ensues. (Cal. State Bar Form. Opn. 1984-84; See also Evidence Code section 951, noting that "client" means a person who consults a lawyer *for the purpose of* retaining the lawyer. Emphasis added.) The client may be a minor or the minor's guardian, if the lawyer is consulted on behalf of the minor. (Evidence Code section 951.) Client secrets may also include matters of public record. (*In the Matter of Johnson* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 179, 189 [prior felony conviction, while public, albeit not easily discovered, may not be disclosed by attorney to a coworker of client].) Finally, only the client can release the attorney of the obligation to maintain such confidential matters. (*Commercial Standard Title Co., Inc. v. Superior Court of San Diego County* (4 Dist. 1979) 92 Cal.App.3d 934, 945.)

Attorneys also owe a duty of candor to the courts. This duty absolutely precludes an attorney from bringing actions employing any means inconsistent with the truth or otherwise making misrepresentations to the tribunal. Section 6068(d) provides as follows:

> It is the duty of an attorney to do all of the following:
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> ...
>
> (d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

Rule 5-200(B) provides as follows:

> In presenting a matter to a tribunal, a member:
>
> ...
>
> (B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law"

In this case, the very essence of the result respondent was seeking would have potentially been made moot by revealing the client secret. That is, Melissa's marriage would, *ipso facto*, have likely resulted in her not being subject to the very ruling that was the purpose of the

appeal.[17]

This case does not present a situation of an attorney faced with simply a choice between two conflicting ethical duties – maintaining client secrets and being candid with the courts. Such a portrayal enters the analysis too late in the process. The resolution of respondent's dilemma should have occurred earlier – when a choice should have been made to *either* file the appeal *or* seek emancipation. If the client wanted to simultaneously do both, the obligation of respondent was to withdraw from the representation, since to do otherwise would result in an inevitable fraud upon the courts. He did not do so,[18] and consequently, violated section 6068(d) and rule 5-200 by misleading a judicial officer by artifice.

However, this conduct has already been found to violate section 6106. It is generally inappropriate to find redundant charged allegations. The appropriate level of discipline for an act of misconduct does not depend on how many rules of professional conduct or statutes proscribe the misconduct. "There is 'little, if any, purpose served by duplicative allegations of misconduct.'" (*In the Matter of Torres* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 138, 148.) Accordingly, the charges involving section 6068(d) and rule 5-200 are dismissed with prejudice.

The court does not find that there is clear and convincing evidence that the failure to disclose to father or his counsel that Melissa went to the Bahamas to marry Austin H. constituted a violation of Business and Professions Code section 6106.

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[17]Respondent argues extensively in his closing brief that, in fact, the Court of Appeal was wrong in concluding that the matter would have necessarily become moot. This argument fails on two levels. First, the findings of the Court of Appeal are now final as to the parties. Second, the argument fundamentally misses the mark. While respondent has suggested that he felt that the marriage was not material (closing brief at page 17, line 1), in fact, the evidence showed that both respondent and Ms. Hannes were holding the existence of the marriage in reserve – in essence, "in their back pocket" – for use in the event the appeal was unsuccessful. Regardless of their confidence in the likelihood of success on appeal, the "emancipation option" was there if they needed it. In summary, while they perhaps preferred to win on the merits of their appeal, they always intended to be able to moot any adverse court decision by Melissa's emancipation that flowed from the marriage.

[18]In fact, on the same day that the appeal was filed by respondent, Ms. Hannes was obtaining the consents of the grandparents to the marriage.

3. Count Five - Rule 3-210 (Advising Violation of Law)

Rule 3-210 of the Rules of Professional Conduct prohibits an attorney from advising the violation of any law, rule or ruling of a tribunal unless he or she believes in good faith that such law, rule or ruling is invalid. An attorney may take appropriate steps in good faith to test the validity of any law, rule or ruling of a tribunal.

There is not clear and convincing evidence that respondent violated rule 3-210. The evidence does not support findings that respondent obtained the grandparents' signatures on consent forms; encouraged Melissa to go to the Bahamas; assisted her in leaving the jurisdiction without prior court approval in violation of the June 12, 2001, order; assisted Melissa in the sham marriage; or advised her grandparents to consent to the sham marriage.

4. Count Six - Rule 5-220 (Suppressing Evidence Contrary to Legal Obligation

Rule 5-220 prohibits an attorney from suppressing any evidence that he or she or his or her client has a legal obligation to reveal or to produce.

Respondent had a legal obligation to inform the Court of Appeal about Melissa's putative marriage because her putative emancipation rendered the trial court's judgment void and the appeal moot.

There is clear and convincing evidence that respondent wilfully violated rule 5-220. However, this count is duplicative of other charges of which respondent has already been found culpable. Accordingly, it is dismissed with prejudice.

5. Count Seven - Rule 1-120 (Assisting, Soliciting or Inducing Violations)

Rule 1-120 of the Rules of Professional Conduct prohibits an attorney from knowingly assisting in, soliciting or inducing any violation of the Rules of Professional Conduct or the State Bar Act.

Although there is clear and convincing evidence that respondent wilfully violated rule 1-120, this count is duplicative of other charges of which respondent has already been found

culpable. Accordingly, it is dismissed with prejudice.

IV. LEVEL OF DISCIPLINE

A. Aggravating Circumstances

It is the prosecution's burden to establish aggravating circumstances by clear and convincing evidence. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct,[19] std. 1.2(b).)

Respondent's multiple acts of misconduct are an aggravating factor. (Std. 1.2(b)(ii).)

B. Mitigating Circumstances

Respondent bears the burden of establishing mitigation by clear and convincing evidence. (Std. 1.2(e).) No mitigating circumstances are found.

C. Discussion

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1025; std. 1.3.)

In determining the appropriate level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628.) As the Review Department of the State Bar Court noted more than 14 years ago in *In the Matter of Bouyer* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 404, 419, even though the standards are not to be applied in a talismanic fashion, they are to be followed unless there is a compelling reason that justifies not to do so. (Accord, *In re Silverton* (2005) 36 Cal.4th 81, 91; *Aronin v. State Bar* (1990) 52 Cal.3d 276, 291.)

Standard 1.6 provides that the appropriate sanction for the misconduct found must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of

[19]Future references to standard or std. are to this source.

imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding, the sanction imposed shall be the most severe of the applicable sanctions. (Std. 1.6(a).) The level of discipline is progressive. (Std. 1.7(b).) The standards, however, are guidelines from which the court may deviate in fashioning the most appropriate discipline considering all the proven facts and circumstances of a given matter. (*In re Young* (1989) 49 Cal.3d 257, 267, fn. 11; *Howard v. State Bar* (1990) 51 Cal.3d 215.) They are "not mandatory 'sentences' imposed in a blind or mechanical manner." (*Gary v. State Bar* (1988) 44 Cal.3d 820, 828.)

Standard 2.3 applies in this matter. It recommends actual suspension or disbarment for culpability of an act of moral turpitude, fraud, intentional dishonesty or of concealment of a material fact from a court, client or other person, depending on the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the attorney's acts within the practice of law.

Respondent has been found culpable of moral turpitude for endorsing and ratifying conduct relating to a minor's putative marriage; and by not informing the Court of Appeal about the putative marriage and engaging in further litigation such as filing the writ of supersedeas and seeking a stay of the trial court judgment while knowing that the minor's emancipation would render the trial court's judgment void and the appeal moot. In so doing, he not only made a misrepresentation by omission to the court, but he wasted scarce judicial resources and caused unnecessary litigation and expense to the minor's father. This court found respondent's multiple acts of misconduct to be an aggravating factor. There are no mitigating circumstances.

The State Bar recommends one year of actual suspension, among other things. Respondent seeks dismissal of the proceedings.

The court found *In the Matter of Lais* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 112 and *In the Matter of Chesnut* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 166 instructive.

In *Lais*, a two-year actual suspension was imposed for violation of section 6068(c) in two client matters as well as for violation of section 6106. In a marital settlement dispute, respondent

Lais, a certified family law specialist, filed a patently frivolous appeal and, in a child custody matter, he lied to police and misled a judge in a complaint. In mitigation, his lengthy blemish-free practice, community service and charitable activities were considered as well as his efforts to correct the problems surrounding the disciplinary matters. The Review Department noted, however, that his experience as a family law specialist and as a State Bar investigation referee should have aided him to avoid the misconduct. In aggravation, his one prior record of discipline was given diminished weight because the misconduct was approximately contemporaneous with the misconduct in question. Also considered were multiple acts of misconduct, lack of insight, failure to comply timely with discovery requests and to file his pretrial statement in the disciplinary proceeding and presenting misleading evidence in mitigation. The Review Department was concerned about the similarity of respondent Lais' misconduct in the present and prior disciplinary matters, noting that it could not be attributed to inexperience or "simple zealousness" and there was nothing in the record to ascribe it to any health or other such condition. (*Id.* at p. 123.) It was also concerned about the possibility of recidivism. Although *Lais* presents mitigating factors that are not present in this case, the present case presents less misconduct and fewer aggravating factors and so merits less actual suspension than in *Lais*.

In *Chesnut*, discipline consisting of two years' stayed suspension, three years' probation and six months of actual suspension was imposed for violations of section 6068(d) and 6106. In a family law matter, the attorney misrepresented to a Texas judge and to a California judge that he had personally served the husband with the California dissolution pleadings. In aggravation, the court considered one prior instance of discipline resulting in 15 days actual suspension and lack of candor. The attorney participated in the proceedings, offered evidence of good character and pro bono community service. The instant case presents more egregious misconduct than *Chesnut* which also offered more mitigating circumstances for consideration and so a greater amount of actual suspension is warranted in this matter than in *Chesnut*.

Having considered the facts and the law, the court recommends discipline consisting of three years' stayed suspension and three years' probation on conditions including nine months

actual suspension, among other things. This matter presents serious misconduct in unique facts and circumstances. Although the court does not condone respondent's actions, it is cognizant of respondent's good intentions in trying to help a minor whom he sincerely believed was in danger. The court believes that there is little likelihood that respondent will again engage in this behavior. Nevertheless, the court finds respondent's misconduct in this matter to be very serious. Accordingly, the court believes that nine months' actual suspension with a lengthy period of probation will be sufficient in this matter to protect the public and preserve public confidence in the profession.

V. DISCIPLINE RECOMMENDATION

IT IS HEREBY RECOMMENDED that respondent **RICHARD ADAM MARCUS** be suspended from the practice of law for three years; that execution of that suspension be stayed, and that respondent be placed on probation for three years, with the following conditions:

1. Respondent must be actually suspended from the practice of law for the first nine months of probation;

2. During the period of probation, respondent must comply with the State Bar Act, the Rules of Professional Conduct and all conditions of probation;

3. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar, 180 Howard Street, San Francisco, California, 94105-1639, **and** to the State Bar Office of Probation, all changes of information, including current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;

4. Respondent must submit written quarterly reports to the State Bar Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. If the first report will cover less than thirty (30) days, that report must be submitted on

the next following quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the probation period and no later than the last day of the probation period;

5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the State Bar Office of Probation which are directed to Respondent personally or in writing, relating to whether respondent is complying or has complied with the conditions contained herein;

6. Within one year of the effective date of the discipline herein, respondent must provide to the State Bar Office of Probation satisfactory proof of attendance at a session of the Ethics School, given periodically by the State Bar at either 180 Howard Street, San Francisco, California, 94105-1639, or 1149 South Hill Street, Los Angeles, California, 90015-2299, and passage of the test given at the end of that session. Arrangements to attend Ethics School must be made in advance by calling (213) 765-1287, and paying the required fee. This requirement is separate from any Minimum Continuing Legal Education Requirement (MCLE), and respondent shall not receive MCLE credit for attending Ethics School (Rule 3201, Rules of Procedure of the State Bar.);

7. The period of probation shall commence on the effective date of the order of the Supreme Court imposing discipline in this matter.

8. At the expiration of the period of this probation, if respondent has complied with all the terms of probation, the order of the Supreme Court suspending respondent from the practice of law for three years shall be satisfied and that suspension shall be terminated.

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, Multistate Professional Responsibility Examination Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the State Bar

Office of Probation within one year of the effective date of the discipline herein. Failure to pass the Multistate Professional Responsibility Examination within the specified time results in actual suspension by the Review Department, without further hearing, until passage. But see rule 951(b), California Rules of Court, and rule 321(a)(1) and (3), Rules of Procedure of the State Bar.

It is also recommended that respondent be ordered to comply with the requirements of rule 955 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.

VI. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: March 16, 2006

RICHARD A. HONN
Judge of the State Bar Court